

- “1. Whether Claimant met with personal injury through a series of accidents culminating in disability on or about December 15, 1995;
- “2. Whether the accidental injuries arose out of and in the course of Claimant’s employment;
- “3. Whether notice was given within ten (10) days and, if notice was not given within ten (10) days, whether notice was given

within 75 days. If notice was given within 75 days, whether there is just cause for the delay;

- “4. Payment of outstanding medical bills and authorization of Ali Manguoglu, M.D. for additional medical treatment; and
- “5. Payment of temporary total disability compensation.”

Also, respondent raises the issue of claimant's average weekly wage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the briefs of the parties, the Appeals Board finds for purposes of preliminary hearing as follows:

The jurisdiction of the Appeals Board to review preliminary hearing orders entered pursuant to K.S.A. 44-534a, as amended, is limited to issues involving the Administrative Law Judge's jurisdiction in granting or denying the relief requested at the preliminary hearing. K.S.A. 44-551(b)(2)(A), as amended. “A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether defenses apply, shall be considered jurisdictional, and subject to review by the board.” K.S.A. 44-534a(a)(2). Accordingly, the issues raised by the claimant as to payment of outstanding medical bills, authorization of Dr. Ali B. Manguoglu for additional medical treatment and payment of temporary total disability compensation, and the issue of claimant's average weekly wage raised by respondent are not subject to review on appeal from a preliminary hearing order.

The Administrative Law Judge based his denial of benefits upon claimant's failure to prove notice of accident was provided to the employer within ten days and claimant's failure to establish just cause for her failure to give notice of accident within ten days as required by K.S.A. 44-520. The Administrative Law Judge did not decide the issues of claimant's accident date and whether the claimant's injury arose out of and in the course of her employment with respondent on the dates alleged. As the Administrative Law Judge's Order was based upon the issue of notice, then that is the issue which will be the subject of this review.

K.S.A. 44-520 provides:

“Notice of injury. Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that

actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice."

Claimant alleges she suffered personal injury by a series of accidents each and every working day through December 15, 1995, her last day of work for respondent. There is considerable discussion in the respective briefs of the parties concerning the date of accident to be used for purposes of determining the issue of whether claimant gave timely notice of accident. The issue turns in part upon the question of whether the accident date should be the last date claimant worked pursuant to the Court of Appeals finding in Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994), as claimant alleges, or an earlier date as is asserted by respondent following Condon v. Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995). The Administrative Law Judge found the facts more analogous to those in the Condon case than to Berry because the claimant left work due to layoff as opposed to her injury. Claimant argues that this case is more analogous to Berry because the claimant delayed undergoing carpal tunnel release surgery until the scheduled work break between semesters and therefore her leaving work was akin to being because of her injury as opposed to an economic layoff. The Appeals Board need not decide this issue in order to resolve the issue upon appeal because, for the reasons that will be explained below, the notice was not timely given for either the November 16, 1996, accident date espoused by respondent or the December 15, 1995, accident date argued by claimant. (It is noted that respondent alleges claimant's last date worked was December 14, 1995, rather than December 15, 1995.) Notice was not given until March 1, 1996, at the earliest. Using the latest date, that being December 15, 1995, as argued by claimant, it is still beyond the 75 days which is the longest time period permitted by statute for the giving of notice.

There is a dispute between claimant and respondent concerning whether claimant verbally gave notice of accident to respondent before March 25, 1996 and, if so, when that occurred. The Administrative Law Judge found that the first oral notice claimant gave to respondent occurred on March 25, 1996. Claimant disputes this but, as the Administrative Law Judge had the opportunity to view the in person testimony of the witnesses, the Appeals Board gives some deference to the findings of the Administrative Law Judge concerning their respective credibility. As such, the testimony of claimant with regard to the timing and context of her conversations with her supervisor is rejected in favor of the

testimony given by her supervisor, Richard Wilson, which was supported by certain coworkers. Accordingly, the first notice respondent had of a work-related injury was the written claim for compensation dated February 29, 1996, which was mailed to respondent. The evidence does not show when respondent received said claim, but the earliest it could have been received would have been the following day or March 1, 1996. This date is beyond 75 days from the last date claimant worked. Accordingly, claimant did not give notice of accident within 75 days after the date of her accident. The employer did not have actual knowledge of the accident. There is no allegation the employer had actual knowledge of the accident or that the employer was unavailable to receive such notice or that the employee was physically unable to give notice. Accordingly, based upon the record as it currently exists, claimant has failed in her burden to prove timely notice was given pursuant to K.S.A. 44-520. The Order of the Administrative Law Judge should be affirmed.

WHEREFORE, it is the finding, decision and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore dated October 16, 1996, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of December 1996.

BOARD MEMBER

c: Jan L. Fisher, Topeka, KS
Darla Lilley, Wichita, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director